Castle Instant Maintenance/Maid, Inc. *and* Service Employees International Union, Local No. 102, AFL-CIO. Case 21-CA-19077

May 22, 1981

DECISION AND ORDER

On December 18, 1980, Administrative Law Judge William L. Schmidt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Castle Instant Maintenance/Maid, Inc., San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Member Jenkins would not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), because the Administrative Law Judge discredited Respondent's asserted reasons for discharging Meza and explicitly found them to be pretextual, so that only the unlawful motive for the discharge remained and the *Wright Line* analysis which concerns weighing two genuine motives is not pertinent. *Limestone Apparel Corporation*, 255 NLRB No. 101 (1981).

Chairman Fanning and Member Zimmerman do not share Member Jenkins' view of the Board's decision in *Wright Line, supra*, as interpreted by its decision in *Limestone Apparel, supra. Limestone* holds that the Board will not find it necessary to apply the specific formulaic approach set forth in *Wright Line*, or to make reference to an administrative law judge's failure to do so where it affirms his finding that the respondent's justification for discharge or discipline against the General Counsel's *prima facie* showing of impermissible motivation was pretextual. We did not there state, or even imply, that the correct result would not, or could not, be reached by applying the mode of analysis set forth in *Wright Line* to a defense which alleges a justification which is found not to have existed or, if it did, not to have been relied upon by the Respondent.

This case merely presents the reverse and equally applicable side of *Limestone*. Here the Administrative Law Judge applied the *Wright Line* format to a pretext discharge. But for Member Jenkins' comments, we would have affirmed the Administrative Law Judge's decision without comment. In *Limestone*, we said: "We shall not . . . in any future cases in which we adopt an administrative law judge's finding of a pretext discharge point to any failure to make specific reference to *Wright Line*." We now add that, in such cases, we shall not find it necessary to comment upon an administrative law judge's reaching the same result by application of *Wright Line*, for a correct analysis that accords with *Wright Line* would not alter the result we would reach in any case. See *Wright Line, supra* at 1084, fn. 5, 1089, fn. 13.

[2] We do not rely on the Administrative Law Judge's analysis in finding that the Board has statutory jurisdiction over Respondent. Rather, we note the Administrative Law Judge's finding that Respondent annually provides janitorial services in excess of $50,000 to the United States Marine Corps. Therefore, we find that Respondent's operations satisfy the Board's indirect outflow standards for nonretail enterprises as set forth in *Siemons Mailing Service*, 122 NLRB 81 (1958). See *St. Francis Pie Shop, Inc.*, 172 NLRB 89 (1968).

However, we do agree with the Administrative Law Judge's finding that the services which Respondent performs for the Marines are sufficient to have a substantial impact on the national defense within the meaning of the Board's discretionary guidelines for asserting jurisdiction. *Ready Mixed Concrete Materials, Inc.*, 122 NLRB 318 (1958); *Trico Disposal Service, Inc.*, 191 NLRB 104 (1971).

[3] Member Jenkins would compute interest on Carlos Meza's backpay in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge: This matter was heard by me on September 30, 1980, at San Diego, California. The complaint was issued on behalf of the General Counsel by the Regional Director for Region 21, on June 26, 1980,[1] pursuant to a charge filed by Service Employees International Union, Local No. 102, AFL-CIO, on May 20, and an amended charge filed by the Union on May 23. The issues were joined by the answer of Castle Instant Maintenance/Maid, Inc., which is dated July 11.[2]

The complaint alleges that the Respondent discharged Carlos Meza on May 16, and that it has failed and refused to reinstate Meza because of his union or other protected concerted activities in violation of Section 8(a)(1) and (3) of the Act. With the exception of some admissions related to the Respondent's business operations, the answer denies every allegation of the complaint.

The General Counsel and the Respondent were represented at the hearing by counsel. All parties were afforded the opportunity to offer relevant evidence, to argue orally, to file post-hearing briefs, and to otherwise be fully heard. On the basis of the record made at the hearing,[3] my observation of the demeanor of the witnesses, and my careful consideration of the briefs filed on behalf of the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation which maintains its principal office at San Diego, California, is en-

[1] Hereinafter all dates refer to the 1980 calendar year unless otherwise specified.

[2] The name of the Respondent appears herein as amended at the hearing.

[3] The transcript of the official proceedings herein is corrected, *su sponte*.

gaged in providing janitorial services to, *inter alia*, agencies of the United States Government, including the U.S. Marine Corps and the General Services Administration (GSA). The answer further admits that, at all times material herein, Respondent has been providing janitorial services for GSA at the San Ysidro Port of Entry facility located at the International Border between the United States and Mexico. The Respondent also admits that it annually provides janitorial services valued in excess of $51,000 to the Marines. However, the Respondent denies that it is an employer engaged in commerce or business affecting commerce within the meaning of Section 2(6) and (7) of the Act, as alleged in the complaint and, at the conclusion of the hearing, the Respondent moved to dismiss the complaint on the ground that the General Counsel had failed to establish the Board's legal jurisdiction over this matter.

The General Counsel argues that the Respondent's admission that it provides services valued in excess of $50,000 for the Marines establishes the existence of the Board's jurisdiction on the basis of either the indirect outflow test established in *Siemons Mailing Service*, 122 NLRB 81 (1958), or the substantial impact on national defense test established by the Board in *Ready Mixed Concrete and Materials, Inc.*, 122 NLRB 318 (1958). In *Ready Mixed Concrete and Materials, Inc., supra*, the Board held that it would effectuate the policies of the Act to assert jurisdiction over all enterprises, as to which the Board has statutory jurisdiction, whose operations exert a substantial impact on the national defense, irrespective of whether the enterprise's operations satisfy any of the Board's other jurisdictional standards. Over the years, the Board has avoided establishing a fixed-dollar amount under its national defense test below which the Board, in the exercise of its discretion, would not assert jurisdiction and, in the past, the Board has asserted jurisdiction over a similar military contractor where the dollar volume of business was significantly less than that performed by the Respondent. See, e.g., *Trico Disposal Service, Inc.*, 191 NLRB 104 (1971). Using *Trico* as a guide, the conclusion is easily reached that the volume of the Respondent's business with the Marines is sufficient to warrant the conclusion that the Respondent's operations have a sufficient impact on national defense so as to warrant the exercise of the Board's jurisdiction under the discretionary standard announced in *Ready Mixed Concrete, supra.*

However, with respect to the threshold question of the Board's statutory jurisdiction, the General Counsel urges that I take judicial notice of the fact that the Marines, as a component of the Department of Navy, employs persons throughout the United States and other parts of the world and purchases goods and services from suppliers located outside of the State of California which are valued in excess of $50,000. For example, the General Counsel's argument continues, a single M-60 tank manufactured by the Chrysler Corporation in Warren, Michigan, costs approximately $700,000 and a single CA-53 helicopter manufactured by Sikorsky in Stamford, Connecticut, costs approximately $4,500,000. The need for such judicial assumptions arises because such facts are not admitted nor otherwise in evidence in this case. Insofar as the record here is concerned, there is no evidence that this Respondent or any of its customers purchase or sell goods or services which are transported directly across any state line.

Although it is probably true that the magnitude of the operations of the Department of Navy in the State of California are such as to make the question of whether or not it is directly engaged in commerce an adjudicative fact which is generally known and, thus noticeable under Rule 201 of the Federal Rules of Evidence, I am satisfied that such an approach is unnecessary in this case.[4] Hence, the term commerce as used in the Act is defined in Section 2(6) to include, *inter alia*, "trade, traffic, commerce, transportation, or communication . . . between any foreign country, and any State, Territory, or the District of Columbia . . . or between points in the same State but through . . . any foreign country." The evidence shows that the instant dispute arises among employees who are employed at the busy border-crossing station between Tijuana, Baja, California, and San Diego County, California. The Respondent here has a service agreement through the Small Business Administration with GSA to maintain the facilities at the San Ysidro Port of Entry facility which houses the border operations of the United States Customs Service and the Bureau of Immigration and Naturalization. The magnitude of the commercial importance of this facility is evident from some incidental facts contained in the record. For example, it was estimated that approximately 15,000 persons walk through this border-crossing station daily. In addition, the facility has 21 traffic lanes to accommodate the vehicular traffic at this border-crossing point. When the foregoing is considered, it is difficult to imagine a setting where a single labor dispute would have the potential to more directly disrupt the commerce which Congress has empowered the Board to regulate than here. Accordingly, on the basis of the Respondent's business activities at the San Ysidro Port of Entry, I am satisfied that the Respondent's operation is sufficiently impressed with the elements of statutory jurisdiction so as to warrant the conclusion that legal jurisdiction exists in this matter notwithstanding the fact that the record contains no evidence that the Respondent or any of its customers receive or furnish goods or services which cross a state boundary. *Colonial Catering Company*, 137 NLRB 1607 (1962). Having concluded that the Board has statutory jurisdiction over the Respondent, I further find that the amount of services that the Respondent admittedly performs for the Marines is sufficient to have a substantial impact on national defense within the meaning of the Board's discretionary guidelines for asserting jurisdiction. *Trico Disposal Service, Inc., supra; Ready Mixed Concrete and Materials, Inc., supra*. Accordingly, I find that the Respondent is an employer within the meaning of Section 2(2) of the Act which is engaged in commerce or a

[4] See, e.g., *St. Francis Pie Shop, Inc.*, 172 NLRB 89 (1968). On the other hand, the General Counsel's request that I take notice of the cost, the location of manufacture and the utilization of certain specific equipment by the Marines in California is, in my judgment, not permitted by Rule 201. *La-Ron Corporation d/b/a Precision Carpet, Inc.*, 223 NLRB 329, 339, fn. 52 (1976).

business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent denies that the Union is a labor organization within the meaning of Section 2(5) of the Act. The record establishes that the Respondent admits employees to membership and that it exists in whole or in part for the purpose of representing employees for the purpose of collective bargaining with employers concerning their wages, hours, and working conditions. The record further establishes that, on August 18, the Union was certified as the exclusive collective-bargaining representative of the Respondent's own employees at the San Ysidro Port of Entry pursuant to Section 9(a) of the Act in Case 21-RC-16394. Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Contentions*

The General Counsel contends that Meza was the principal initiator of the Union's successful drive to organize the Respondent's employees at the San Ysidro Port of Entry station (San Ysidro). The General Counsel further contends that there is direct evidence that the Respondent knew of Meza's activities in this regard and that the Respondent terminated Meza because of his role in instigating the organizing drive. Entirely apart from the direct evidence offered by the General Counsel concerning the element of knowledge, the General Counsel further contends that knowledge of Meza's organizing activities may be inferred on the basis of the so-called small plant doctrine[5] and, as the Respondent's asserted reasons for terminating Meza are pretextual, the further inference is warranted that Meza's discharge resulted from his union activities.

The Respondent contends that Meza was discharged for cause; i.e., that he was unable to perform his assigned work of maintaining floors in a condition sufficient to meet standards imposed by GSA. Apart from this affirmative defense, the Respondent denies that it learned of any union activities among its employees until after the date of Meza's discharge and, for these reasons, the Respondent contends that the General Counsel has failed to prove that Meza was discharged in violation of the Act by a preponderance of the credible evidence.

B. *The General Counsel's Case*

Carlos Meza was hired by the Respondent's general foreman, Jose Avila, and he commenced his employment on February 8. Meza was assigned to the Respondent's crew engaged in the building maintenance work at San Ysidro where the Respondent employs approximately 10 employees and 1 supervisor, Isaias Serrano. Meza's principal job was to clean and polish floors at the port of entry facility. Until the final week of his employment, Meza was assigned to a shift which worked from 4:30 p.m. until 1 a.m.

According to Meza and a fellow employee, Humberto Saldana, the employees at San Ysidro began discussing among themselves the possibility of seeking union representation in late April. Eventually, these informal discussions at work led to a meeting among some of the employees at a nearby Jack-In-The-Box Restaurant on approximately May 4.[6] During this meeting, Meza volunteered to investigate specific labor organizations which could represent the San Ysidro employees. In furtherance of this undertaking, Meza spoke to an individual named Barbara, who was employed at San Ysidro by the U.S. Customs Service. Barbara offered to take Meza to meet with the representatives of the Union.

Meza testified that on May 9, Barbara accompanied him to the Union's offices where they met with James Hawes, the Union's executive secretary treasurer. In the course of this meeting, Meza explained the reasons the San Ysidro employees felt they needed a union and Hawes explained the benefits the employees could hope to achieve by organizing. During this meeting, Meza signed a union card and Hawes provided Meza with eight or nine additional cards to distribute to his fellow employees. In addition, Meza arranged with Hawes to meet with the San Ysidro employees of the Respondent at a nearby Sambo's Restaurant on the evening of May 12.

Following his meeting with Hawes, Meza returned to the San Ysidro facility and met with Maria Berregan as she was leaving work. Meza reported the substance of his meeting with Hawes to Berregan and gave Berregan four or five of the authorization cards to distribute to other employees. Meza also solicited Berregan's assistance to inform employees of the scheduled May 12 meeting with Hawes. According to Meza, he sought Berregan's aid because she had a greater opportunity to meet with the employees and pass along the information that he had obtained.[7]

The prearranged meeting at Sambo's Restaurant took place as scheduled on May 12. In the course of this meeting, Meza and another employee served as interpreters between the predominately Spanish-speaking employee complement and the union representatives who attended. On the following day, the Union filed the petition in Case 21-RC-16394 at the National Labor Relations Board Resident Office in San Diego.

Effective May 12, Meza was transferred from his job of maintaining the floors to the "gardener's" job which amounted primarily to policing the outside grounds. However, the gardener's job also appears to have includ-

[5] Apart from showing that the Respondent employs a small number of employees at San Ysidro, the General Counsel developed little other evidence to support his small plant theory. Where, as here, other evidence shows that the San Ysidro facility serves as the work situs for employees of several other persons and as a busy public facility, the basis for the General Counsel's argument in this regard is significantly diminished. Accordingly, it will not be further considered herein.

[6] In his tesimony, Meza was unable to recall the exact date of this employee meeting, but on the basis of his testimony concerning the chronology of events leading to a meeting with a union representative on May 9, it appears that the Jack-In-The-Box meeting occurred on May 4 at the latest.

[7] There is no evidence that the Respondent was aware of Berregan's activities or that any discrimination was practiced against her as a result of her union activities.

ed the floor maintenance in a small building situated at Browns Field, a U.S. Customs Service landing strip located approximately 20 minutes from San Ysidro by automobile. On Friday, May 16, when Meza was gathering the equipment to go to Browns Field, he overheard one end of a telephone conversation between Serrano and Avila.[8] In this conversation, Serrano inquired as to what was going to happen with Meza and, after a brief pause, Meza then heard Serrano state words to the effect that Meza would be permitted to finish the day and then he would be terminated as though he was repeating an instruction.

Upon his return from Browns Field on May 16, Meza went to the timeclock to punch out. He was met there by Serrano who handed him an envelope containing his termination slip. After Meza had reviewed the termination slip, Serrano offered to read it to Meza if he did not understand it. When Meza told Serrano that he understood it, he then stated to Serrano, "You told me that I had to have three warnings before you get fired."[9] Serrano replied, "No, you can have 5, 10, 20 warnings as long as the company likes you." At that point, Meza said nothing further and left.

The General Counsel produced direct evidence of the Respondent's motive for terminating Meza through the testimony of Humberto Saldana, another of the Respondent's employees at San Ysidro. Saldana testified that at approximately 2:30 p.m. on Wednesday, May 7, Serrano approached him at work and told him that he was going to be assigned to the floor maintenance work because the Respondent wanted to move Meza to his job and then terminate him because the Resoondent had become aware that Meza was "moving the union." Serrano promised Saldana that he would be moved back to his old job on days as soon as he could. Saldana commenced working the floor maintenance job on May 10 and Meza began working as the gardener on May 12.[10]

Meza claimed that Serrano was extremely critical of his work but he attributed Serrano's attitude to his rebuke of Serrano's approach to him concerning his religious beliefs. On May 1, which was one of Meza's off days, Meza went to the Respondent's home office where he met with Oswaldo Castillo, the Respondent's president, concerning his belief that Serrano was harassing him because of his unresponsive attitude toward Serrano on the subject of religion. According to Meza, Castillo told him that he was the third person to make a similar complaint and that he would look into the matter. Castillo, who also testified concerning this meeting, did not mention that he had similar complaints but acknowledged that he told Meza that he would have Avila meet with Serrano and Meza about the matter. Avila testified that he arranged for such a meeting through Serrano which was supposed to occur immediately after another scheduled meeting with the San Ysidro employees on May 5, but Meza left before there was an opportunity for the three men to meet. There is no evidence that any further attempt was made to inquire into the matter.

Raymond Seewald, a U.S. Customs Service supervisor at San Ysidro, testified that he had never lodged any complaints against the Respondent's service at the San Ysidro facility as he had done when GSA was directly responsible for the maintenance of the facility. Subsequent to Meza's discharge, Seewald provided Meza with a laudatory letter of recommendation.

C. The Respondent's Case

In support of its case that Meza was terminated for cause, the Respondent presented the testimony of its general foreman, Jose Avila, Meza's immediate supervisor, Isaias Serrano, the GSA inspector, Martin Galvez, who conducted the weekly inspection of the facilities at San Ysidro and its resident Oswaldo Castillo.

Avila testified that he hired Meza and assigned him to the San Ysidro crew where he worked a number of jobs in order to learn the variety of tasks at that location. Approximately a month after Meza had been employed, Avila had occasion to inspect the floors at San Ysidro and the work then being performed by Meza. At that time and for the first 2 months of Meza's employment, Avila felt the floors were being maintained in a satisfactory fashion. However, the quality of floor care by Meza started to deteriorate after this time in Avila's view. Following one specific inspection by Avila in this latter period, he ordered Serrano to provide help to Meza to bring the floor condition up to par. Thereafter, Avila testified, he received a phone call from Hector Ochoa, a GSA general foreman with responsibility over the San Ysidro facility, who told him that he and another GSA supervisor at San Ysidro had inspected the port of entry facility and that the whole area seemed to have a sticky substance all over the floors.[11] Avila further testified that Ochoa told him that this condition had to be corrected in 2 days or GSA would require that the floors be completely stripped and rewaxed. Because of this report, Avila decided to replace Meza on the floor care work as Serrano had recommended to him 2 or 3 days earlier. Serrano effectuated Meza's transfer by switching the jobs performed by Meza and Saldana. Avila testified that he thereafter decided to discharge Meza on May 16. According to Avila, he initially directed Serrano to transfer Meza rather than terminate him because he needed the added time to obtain a replacement for Meza.

Serrano testified that Meza spent his first week on the job learning about floor maintenance and about the operation of the floor care equipment. Thereafter, the job was assigned to Meza. Serrano characterized the condition of the floors during Meza's first month of employment as "beautiful." Serrano said that the quality of the floor care subsequently deteriorated. In Serrano's words. "[T]hey started to look bad, lack of wax, dirty build-up

[8] Meza's conclusion that Serrano was talking with Avila was based on Serrano's salutation, "Mr. Joe," which, according to Meza, Serrano typically used in greeting Avila.

[9] Meza testified that Serrano told him of the three-warning rule when he commenced his employment. Such a rule appears to have been later applied to the detriment of Humberto Saldana. However, there is no mention of such a rule in the Respondent's work rules which are in evidence.

[10] As a result of this switch, Meza was not required to work on May 10 or 11.

[11] Meza testified that Serrano informed him of a special inspection but no effort was made to connect this inspection with the Ochoa inspection referred to by Avila through either Meza or Serrano.

in the corners, under the furniture was other stains." Serrano testified that he verbally warned Meza on three or four occasions and the record contains one written warning which was issued to Meza during the middle period of his employment. That written warning is dated April 14, and is signed by Meza to acknowledge its receipt. Boxes labeled "disobedience," "carelessness," and "work quality," on the form are checked, and in the space provided for a narrative comment, Serrano wrote that Meza was being warned primarily because he was not following orders. If it is assumed that this statement refers to deteriorating floor-care work, it is somewhat puzzling because in the GSA inspection reports for the two inspections immediately prior to the April 14 written warning, the rating for floor-care was 4.5 on a scale of 5—the highest rating for that aspect of the San Ysidro work for any inspection period shown in the record in this case while the rating for the inspection immediately after April 14 shows the lowest rating for any report in evidence. However, no other explanation was proffered for that statement.

At the hearing, Serrano was examined concerning another written warning which he allegedly gave to Meza preceding the April 14 warning but this warning was not offered in evidence. In the course of his testimony, Meza denied receiving more than one written warning. Nevertheless, in his testimony, Serrano insisted that he prepared an earlier warning on March 14 and gave it to Meza. In the course of the examination, however, it was established that several dates contained on this warning notice were inconsistent with the preparation and issuance of the warning on March 14.

According to Serrano's version of the events leading to Meza's discharge, the floor care continued to deteriorate and the inspector's ratings were becoming worse and worse. Serrano said that it finally reached a point where he had to do something quickly, so he recommended that Meza be transferred to another position.[12] As a consequence, Meza was transferred to the position of gardener and Saldana, who had previously performed the gardener's work, was assigned to the floor care operation. Based on the weekly GSA inspection reports detailed, *infra*, it appears that the quality of floor care did not improve. However, there is no indication that any warnings were issued to Saldana for the condition of the floors through this period. Rather, on September 9, Saldana was discharged for absenteeism.

Avila testified that the first he knew of any union activity at San Ysidro on the part of the Respondent's employees was on or about May 22, when a written communication was received from the Board office in connection with either the petition in Case 21-RC-16394 or the charge in the instant matter. Serrano said he first learned of the union activity among the Respondent's employees was on or about May 23 or 24, when Avila spoke to him. Castillo testified that the first indication that he had of any union activity among the employees at San Ysidro was when he received a telephone call on May 20 from a Resident Office employee to inquire if the Respondent had received a communication from the Board's office. Castillo testified that the Respondent had not yet received any communication so he inquired as to where the document had been sent and learned that the document had been sent to a wrong address. Another copy of the document was to be forwarded to the Respondent at its correct address and it appears that this is the document Avila referred to in his testimony. Both Avila and Serrano denied that they ever talked to Meza about the Union. Serrano denied that they ever told Saldana that Meza was going to be terminated for his union activities, but he had no particular recollection of the conversation between himself and Saldana when Saldana was informed of his transfer to the floor-care work.

Martin Galvez, the GSA inspector who normally conducted the inspections of the Respondent's work at San Ysidro, testified concerning the inspection reports he prepared in the months of March, April, May, and June. Those reports show the following ratings for floor care based on a scale of 1 (lowest) to 5 (highest):

March 3	3.50
March 10	3.00
March 17	4.25
March 24	4.50
April 7	4.50
April 21	2.75
April 28	4.00
May 5	4.25
May 19	Rept. not in evidence
May 29	4.00
June 10	3.75
June 16	4.00
June 21	3.00

A more careful review of the inspection reports disclose that where floor care is shown as a separate subitem of another category, such as room care or corridors and entrances, the ratings are not always consistent. Galvez testified that Ochoa is one of his supervisors but that he was unaware of a special inspection by Ochoa between the months of January and June. No inquiry was made of Galvez concerning the sticky floor condition which Avila alluded to in his testimony.

In *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980), the Board articulated the test to be employed in all cases alleging violations of Section 8(a)(3) or violation of Section 8(a)(1) which turn on the question of motivation. Under the *Wright Line* test, the General Counsel is required to make a *prima facie* showing to support the inference that protected conduct was the motivating factor in the employer's action being examined. Once such a *prima facie* case is established, the burden is shifted to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Id.* at 1087. However, this shifting of burdens does not shift the ultimate burden of the General Counsel to establish the existence of an unfair labor practice by a preponderance of the evidence. *Id.* at 1088, fn. 11. As the allegation in the complaint in

[12] Serrano testified further in this regard that he never recommends the termination of employees. This is inconsistent with a finding made in the Regional Director's Decision and Direction of Election that Serrano recommends the termination of two or three employees each month.

this matter alleges that the Respondent violated Section 8(a)(3) of the Act, the analytical approach of *Wright Line, supra*, applies.

Based on the foregoing findings and the entire record, I am satisfied that the General Counsel has established by a preponderance of the credible evidence that Meza was terminated because of his union activities. This conclusion is warranted on the basis of the testimony of Saldana which provides direct evidence of Respondent's motivation as well as the fact that the Respondent's assigned reason for terminating Meza is inconsistent with the objective evidence concerning the floor care ratings in the last weeks of Meza's employment.[13] In general, the GSA inspection reports strongly support the conclusion that the quality of floor care under Meza was at least equal to that provided by Saldana who appears never to have been warned or terminated for substandard work. This conclusion alone detracts considerably from the Respondent's burden of demonstrating that the adverse action it took against Meza would have occurred even in the absence of Meza's protected conduct. In this same connection, the GSA inspection reports show that Serrano's assertion to the effect that Meza's care of the floors deteriorated rapidly in his final few weeks of employment so as to necessitate taking quick action is simply unsupported. When this latter fact is considered together with Serrano's self-contradictory testimony concerning the written warning he allegedly issued to Meza in March and his inability to recount the substance of the critical conversation wherein he informed Saldana of his transfer to the floor care work to replace Meza, it becomes clear that any conclusion grounded upon Serrano's testimony is not reliable. Moreover, the Respondent's failure to call Ochoa to corroborate Avila's critical testimony concerning the sticky floor incident, or to explain Ochoa's absence, warrants the inference that Ochoa would not have corroborated Avila's testimony in this regard especially where, as here, Ochoa's subordinate Galvez, who was called by the Respondent gave no indication that he was aware of the incident. On the other hand, no attempt was made to impeach Saldana's testimony by means of inconsistencies between his testimony and his pre-hearing statement, which was provided to the Respondent, or by means of bias grounded on a showing that his pre-hearing statement was provided after his discharge in September. The Respondent's attempt to impeach Saldana on the purely collateral matter relating to his request for time off in August is wholly insufficient to cast doubt upon his critical testimony concerning the transfer conversation. Concluding as I have that there is no substantial basis to doubt Saldana's testimony, I find his account of the May 7 conversation with Serrano, wherein the latter stated that Meza was about to be discharged for "moving the union" to be credible. In view of this remark by Serrano, I am satisfied that the Respondent's officials learned of the employees' organizing efforts substantially before it received any communication about the filing of the National Labor Relations Board petition by the Union as claimed. Having also concluded that the Respondent's asserted reason for transferring and then terminating Meza is a pretext, I am fully satisfied that the General Counsel has established by a preponderance of the credible evidence that Carlos Meza was terminated for his leading role in the organizing effort. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged. The complaint herein makes no reference to Meza's transfer to the gardener's job although the version of the events I have credited above makes it clear that this transfer was a mere preliminary step to Meza's subsequent termination only a short time later. For this reason, I am satisfied that Meza's transfer on or about May 12 was, likewise, unlawful and an appropriate remedial order shall be entered for this conduct.

[13] The General Counsel does not allege Serrano's statement to Saldana on May 7 as an independent 8(a)(1) violation.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that the Respondent be ordered to offer Carlos Meza immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed. It is also recommended that the Respondent be ordered to make Carlos Meza whole for the losses which he suffered as a result of his transfer on May 12 and his termination on May 16 in the manner provided by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as provided by the Board in *Olympic Medical Corporation*, 250 NLRB 146 (1980), and *Florida Steel Corporation*, 231 NLRB 651 (1977). And see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). It is further recommended that the Respondent expunge from its records any reference to Meza's transfer and termination. Finally it is recommended that the Respondent be ordered to post the attached notice to marked "Appendix" for 60 consecutive days in order that employees may be apprised of their rights under the Act and the Respondent's obligation to remedy its unfair labor practice.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By transferring Carlos Meza on or about May 12, and by discharging Carlos Meza on or about May 16, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Pursuant to Section 10(c) of the Act and upon the foregoing findings of fact, conclusions of law, and the entire record herein, I hereby issue the following recommended:

ORDER[14]

The Respondent, Castle Instant Maintenance/Maid, Inc., San Diego, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Transferring or discharging any employee in retaliation for engaging in activities on behalf of Service Employees International Union, Local No. 102, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees because they choose to engage in activities on behalf of Service Employees International Union, Local No. 102, AFL-CIO, or discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in that labor organization except to the extent permitted by an agreement described in Section 8(a)(3) of the Act.

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to Carlos Meza and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the section above entitled "The Remedy."

(b) Expunge from its records any reference to Carlos Meza's transfer and termination in May 1980.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary or useful to a determination of the amount of backpay due under the terms of this Order, the propriety of any offer of reinstatement made to Carlos Meza, and the Respondent's compliance with subparagraph (b) above.

(d) Post at its office in San Diego, California, and at any location available to it at the San Ysidro Port of Entry facility for the purpose of posting notices to employees copies of the attached notice marked "Appendix."[15] Copies of said notice on forms provided by the Regional Director for Region 21, shall be duly signed by the Respondent and posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT transfer or discharge any employee for engaging in union activities or otherwise exercising any of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Carlos Meza immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings incurred from being transferred and then terminated in May 1980, with interest.

WE WILL expunge from our records any reference to Carlos Meza's transfer and termination in May 1980.

CASTLE INSTANT MAINTENANCE/MAIDS, INC.